defendant and in spite of the metamorphosis continued to be trust money, the beneficiary of the money now being the defendant, the plaintiffs had the right of recourse (in respect of the fees owed by the defendant) by way of, inter alia, set-off against the money standing to the credit of the defendant. 'Set-off' here is not to be limited to a set-off pleaded in a statement of defence but has reference to the right of setting off the amount owed against the amount held. In the context such setting off means the settling of the account between the parties and, in my judgment, can be implemented by drawing on the amount due as was done here.

One other matter that has to be dealt with is the effect of the appointment of the receivers and the order of the court that gave directions to the receivers. The short answer to the problem is that the said appointment and the said order of court, not being retrospective in effect, have no relevance to the issues herein in that they came into existence well after the drawings had been effected by the plaintiffs.

Accordingly the plaintiffs are entitled to the declarations sought in prayers (i) and (ii) of the originating summons. I also hold that, in any event, the plaintiffs were, because of r 15, entitled to set off the amount owing by the defendant and that, accordingly, it was in order for the plaintiffs to do so by drawing on the money held in the client account. The costs of and incidental to the application will be paid by the defendant.

Application allowed.

Solicitors: *Joginder Singh & Co; Rashid & Lee.*

Reported by *PS Ranjan*

Ku Yan bte Ku Abdullah v Ku Idris bin Ku Ahmad & Ors

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24-1343-89
KC VOHRAH J
13 OCTOBER 1991

Land Law — Partitioning of land — Application for partitioning by co-proprietor holding majority share in land — Other co-proprietors not joining in or giving consent — Whether application must be made to land administrator in first instance — Whether applicant may apply to High Court — National Land Code 1965 ss 140, 141, 141A & 145

The plaintiff held a 5/7th undivided share in a piece of land in the state of Kedah. The defendants held the remainder. The plaintiff applied to the land administrator for the land to be partitioned. The application was rejected by the Director of Land and Mines who advised the plaintiff to apply to the High Court for an order for partitioning the land. The plaintiff made such an application to the High Court under s 145 of the National Land Code 1965 showing a proposed plan. Later the application was amended to include, inter alia, a new proposed plan. The defendants contended that the court had no jurisdiction to decide on the new application. They said that since there was a new proposed plan the plaintiff had to apply to the land administrator to partition the land in accordance with s 141A of the Code before the matter would be dealt with by the court.

Held, dismissing the defendants' objection:

(1) Section 141A of the Code does not compel a co-proprietor holding the majority share in a piece of land to apply to the land administrator for approval to partition the land; it is merely a permissive section.

(2) A co-proprietor having the majority share in a piece of land thus is not barred from applying to the High Court under sub-s (1) of s 145 of the Code to have the co-proprietorship terminated and the land partitioned under s 145 on the general ground that a co-proprietor will not join in nor consent to the making of an application for partitioning.

[Bahasa Malaysia summary

Plaintif memegang 5/7 bahagian yang tidak dibahagikan dalam sebidang tanah di negeri Kedah. Defendan memegang bakinya. Plaintif memohon kepada pentadbir tanah untuk tanah itu dipecah milik. Permohonan itu ditolak oleh Pengarah Tanah dan Galian yang menasihatkan plaintif supaya memohon kepada Mahkamah Tinggi untuk perintah pemecahan milik tanah itu. Plaintif membuat permohonan sedemikian kepada Mahkamah Tinggi di bawak s 145 Kanun Tanah Negara 1965 dengan menunjukkan satu pelan cadangan. Selepas itu permohonan itu dipinda untuk memasukkan, antara lainnya, satu pelan cadangan yang baru. Defendan berhujah bahawa mahkamah tidak ada bidang kuasa untuk mempertimbangkan permohonan yang baru itu. Kata mereka memandangkan yang terdapat satu pelan cadangan yang baru plaintif harus memohon kepada pentadbir tanah untuk memesah milik tanah itu menurut s 141A Kanun itu sebelum perkara itu boleh dipertimbangkan oleh mahkamah.

Diputuskan, menolak bantahan defendan itu:

(1) Seksyen 141A Kanun itu tidak mewajibkan seorang tuan tanah bersama (co-proprietor) yang memegang syer

majoriti di dalam sebidang tanah memohon kepada pentadbir tanah untuk kebenaran memecah milik tanah itu; ia cuma merupakan satu seksyen yang bersifat 'permissive'.

(2) Seorang tuan tanah bersama yang memegang syer majoriti di dalam sebidang tanah oleh kerana itu tidak dihalang daripada memohon kepada Mahkamah Tinggi di bawah s 145(1) kanun itu untuk pemilikan bersama itu ditamatkan dan tanah itu dipecah milik di bawah s 145 atas alasan am bahawa seseorang tuan tanah bersama itu enggan turut atau memberi persetujuan membuat permohonan untuk pemecahan milik.]

Legislation referred to
National Land Code 1965 ss 140, 141, 141A, 142, 145

Zainal Rashid for the plaintiff.
George John for the defendants.

Cur Adv Vult

KC Vohrah J: The plaintiff is a co-proprietor of a piece of land to the extent of 5/7th undivided share. The four defendants are co-proprietors of the remaining 2/7th share. The land is comprised in SP No 24156, Lot 303, Mukim of Tajar, Kota Setar, Kedah.

The plaintiff applied to the Land Administrator, Kota Setar for the land to be partitioned. When that application was made is not known but it is apparent from the affidavit filed by the plaintiff that the other co-proprietors neither joined in nor consented to the application. Presumably the application was made with s 141A of the National Land Code 1965 ('the Code') in mind. The application was rejected. No reason was given for the rejection in the letter from the Director of Land and Mines, Kedah where the plaintiff was advised to apply to the High Court to partition the land. The plaintiff then applied to this court to exercise its powers to partition the land under s 45 of the Code on 16 September 1989 in accordance with a proposed plan which was annexed to the supporting affidavit of this application and for the issuance of two title deeds, one for the plaintiff and another for the four defendants.

There were several technical problems with the application and there was an amendment made to the application with the leave of court on 21 February 1991. A new proposed plan to partition the land has been submitted and there is now also a prayer for the issuance of five title deeds.

The defendants say that with the new application the court has no jurisdiction to decide in the matter. The argument is that since there is a new proposed plan the plaintiff has to apply to the Land Administrator to partition the land in accordance with s 141A as the plaintiff is a co-proprietor holding the majority share in the land; and this has to be done before the matter can be dealt with by the High Court.

Section 141A reads:

> Notwithstanding the provisions of sections 140 and 141, a co-proprietor or co-proprietors holding a majority share may apply for approval to partition the said land.

By implication, through the reference to ss 140 and 141, application may be made by a co-proprietor or co-proprietors holding a majority share in land to the land administrator to partition the land even if the other co-proprietors do not agree to the application.

Section 140(1), in gist, provides that alienated land held by co-proprietors may by agreement between them and by approval of certain authorities, be partitioned so as to vest in each of them, under a separate title, a portion of land of an area proportionate as nearly as may be to his undivided share in the whole.

Section 141(1)(a) prohibits approval of a partition unless each of the co-proprietors has either joined in or consented to the making of the application for its approval.

In my view s 141A does not compel a co-proprietor holding the majority share in a piece of land to apply to the land administrator for approval to partition the land; it is merely a permissive section, and if he elects to make such an application, s 142(1) would apply to him bearing in mind para (e) of s 142(1) and bearing in mind that the land administrator would have to act in accordance with sub ss (3) and (4) of the section in dealing with such an application.

In my view, too, a co-proprietor having the majority share in a piece of land thus is not barred from applying to the High Court under sub-s (1) of s 145 to have the co-proprietorship terminated and the land partitioned under sub-s (2) of s 145 on the general ground that a co-proprietor will not join in nor consent to the making of an application for partition. There is no reference in any part of Chapter 2 of Part 9 of the Code, a chapter dealing with partition of lands, that in respect of a co-proprietor holding the majority share in a piece of land he must first apply to the land administrator for partition under s 145 before he applies to the High Court.

I therefore rule that I have the jurisdiction to hear this application. In order for me to adjudicate in the matter it would be necessary for me to consider the grounds on which the defendants are objecting to the application and I give them two months from today to file their affidavit showing their grounds of objection. I would also require evidence of the comparative value of the individual portions proposed in the plan.

Objection dismissed.

Solicitors: *Ahmad Farid & Associates; George John & Co.*

Reported by *PS Ranjan*